

## **REMARKS**

The following remarks are submitted to address all issues in this case, and to put this case in condition for allowance. Applicant amends the claims solely to better describe the subject matter of the present invention. No new matter is believed to be added in these amendments. Application claims 1-5, 7-17, 20-27, 30-39, and 45-47 are pending in this application. Application claims 6, 18, 19, 28, 29, 40-44, and 48 have been cancelled. Application claims 1, 27, 30-35, and 45-46 are the only independent claims. Applicant has studied the Office Action mailed November 20, 2009 and responds with the following remarks. These remarks are submitted to address all issues in this case, and to put this case in condition for allowance.

### **Examiner Interview**

Applicant thanks the Examiner for the courtesy of a telephonic interview, which was conducted between Examiner Darwin P. Erez and Applicant's attorney, Kirk A. Damman, on February 8, 2010. The participants discussed in detail the §102, rejection of the November 20, 2009 Office Action. Applicants specifically pointed out that the "ribs" of Pagan are not the corresponding "means" of the present claim 34 to which the Examiner agreed.

### **Allowed Subject Matter**

The Examiner is thanked for his indication that claims 1-5, 7-17, 20-26, 30-33, and 45-47 are allowed over the art of record. Applicant also thanks the Examiner for his indication that claim 27 would be allowable if the §112 rejection is overcome.

### **35 USC § 112**

The Examiner rejected claims 27, 34, and 48 under 35 U.S.C 112, second paragraph, as being indefinite. Without regard as to the correctness of the Examiner's rejection, Applicant has amended claims 27 and 34 to deal with the antecedent basis issues and has cancelled claim 48. In light of the Applicant's amendments, the Examiner's §112 rejection is now believed to be moot. As such, Applicant respectfully requests that the Examiner let these claims pass to issue.

### **35 U.S.C. § 102 and § 103**

The Examiner rejected Applicant's claims 34-39 under 35 U.S.C. 102(b) as being anticipated by Pagan (U.S. 6,240,922) and/or obvious under 35 U.S.C. 103 in light of Pagan in view of Brain (U.S. 5,682,880) or Callaghan, *et al.* (U.S. RE 35,531).

### **Claims 35-39**

Applicant believes that at least the current claims 35-39 are fully supported under 35 USC §112 by the original parent application Serial No.: 08/843,631 filed April 10, 1997, now US Patent 5,937,860, and are therefore entitled to an effective filing date of April 10, 1997. As that date is prior to the March 11, 1998 US filing date of Pagan used for purposes of 35 USC §102(e) (see MPEP 706.02(a)) Pagan is not believed to constitute prior art to those claims.

As all the current rejections are based on Pagan, it is therefore believed that the present claims 35-39 are allowable over the art of record and respectfully request that the Examiner withdraw his objection thereto.

#### **Claim 34**

With regards to Independent claim 34, the Examiner contends that the horizontal ribs of Pagan comprise the means of the present claims and the Pagan reference is citable as prior art as the parent case of the present application does not disclose the ribs. As discussed in the above referenced Interview, Applicant respectfully disagrees as the ribs of the present case do not correspond to the indicated means. As indicated in the present specification (for example, at page 18, lines 1-5) the angled shape of the distal end (24) of the respiratory tube (26) provides a means for moving the epiglottis. As such shape is shown in the original parent case (See e.g. distal lumen (32) in FIG. 3 of application 08/843,631), Pagan is unavailable as a reference to show the means element as discussed above.

As Pagan is not an available reference for showing this element, claim 34 cannot be anticipated or rendered obvious by the Pagan reference and Applicant therefore respectfully requests the Examiner withdraw his objection thereto.

Applicant respectfully notes that without the Pagan reference, the Examiner is missing elements of the present claims. As none of the Examiner's other cited prior art references can fill in the hole of Pagan, the Examiner can not make out a *prima facie* case for obviousness.

## Conclusion

In light of the above remarks and amendments, Applicant believes that all of the Examiner's rejections of the pending claims have been overcome; and since none of the references cited by the Examiner, anticipate or render obvious all of the elements of the claims presented herein, Applicant respectfully requests that the Examiner withdraw all rejections to the present application and allow this application to pass to issuance.

As a final point, there is also included herewith a petition for a one month extension of time, a Request for Continued Examination (RCE) and the associated fees. Applicant believes that no further fees are due with this filing; however, the Commissioner is authorized to credit any overpayment or charge any deficiencies necessary for entering this Response, including any claims fees or extension fees to or from our **Deposit Account No. 50-0975**.

If any questions remain, Applicant respectfully requests a telephone call to the below-signed attorney at (314) 444-7783.

Respectfully submitted,  
Lewis, Rice & Fingersh, L.C.



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Kirk A. Damman  
Registration No. 42,461  
*Attorney for Applicants*

**Customer Number: 22822**  
Lewis, Rice and Fingersh, L.C.  
Attn: Box IP Dept.  
600 Washington, Suite 2500  
St. Louis, MO 63101  
Tel: (314) 444-7600  
Fax: (314) 444-7788